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9 UNITED STATES DISTRICT COURT
10 CENTRAL DISTRICT OF CALIFORNIA - SOUTHERN DIVISION
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12 DEENA MARIE CALLAHAN,) No. SA CV 16-00588-AS
13)
14 Plaintiff,)
15 v.) **MEMORANDUM OPINION**
16)
17 NANCY A. BERRYHILL,¹)
18 Acting Commissioner of Social)
19 Security,)
20 Defendant.)
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19 I. PROCEEDINGS

21 On March 30, 2016, Plaintiff Deena Marie Callahan ("Plaintiff")
22 filed a Complaint seeking review of the Commissioner's denial of
23 Plaintiff's application for a period of disability and disability
24 insurance benefits. (Docket Entry No 1). On August 31, 2016,
25 Defendant filed an Answer to the Complaint, and the Certified
26 Administrative Record ("AR"). (Docket Entry Nos. 20-21). The

27 ¹ Nancy A. Berryhill is now the Acting Commissioner of Social
28 Security and is substituted for Acting Commissioner Carolyn W.
Colvin in this case. See 42 U.S.C. § 205(g).

1 parties have consented to proceed before a United States Magistrate
2 Judge. (Docket Entry Nos. 14-15). The parties filed a Joint
3 Stipulation ("Joint Stip.") on December 20, 2016, setting forth
4 their respective positions on Plaintiff's claims. (Docket Entry No.
5 24).

6 7 **II. BACKGROUND AND SUMMARY OF ADMINISTRATIVE DECISION**

8
9 On February 25, 2014, Plaintiff, formerly employed as a policy
10 holder information clerk (see AR 23, 51), filed an application for
11 disability insurance benefits, alleging disability beginning on
12 October 17, 2013. (AR 154-55). On July 20, 2015, Administrative
13 Law Judge ("ALJ"), John Wojciechowski, examined the record and heard
14 testimony from Plaintiff and vocational expert ("VE"), Kelly Winn-
15 Boaitey. (AR 31-54). On October 5, 2015, the ALJ denied Plaintiff
16 benefits in a written decision. (AR 9-30).

17
18 The ALJ applied the five-step process in evaluating Plaintiff's
19 case. At step one, the ALJ determined that Plaintiff had not
20 engaged in substantial gainful activity after the alleged onset date
21 of October 17, 2013, and that Plaintiff's date last insured was June
22 30, 2019. (AR 14). At step two, the ALJ found that Plaintiff had
23 the following severe impairments: degenerative disc disease of the
24 lumbar spine with neuropathy; tendon tears and osteoarthritis of the
25 ankles; ligament tears in the wrists; obesity; depressive disorder;

1 and anxiety disorder. (AR 14-15).² At step three, the ALJ
2 determined that Plaintiff's impairments did not meet or equal a
3 Listing found in 20 C.F.R. Part 404, Subpart P, Appendix 1. (AR 15-
4 17).

5
6 Before proceeding to step four, the ALJ found that, through the
7 date last insured, Plaintiff had the residual functional capacity
8 ("RFC")³ to do the following: occasionally lift or carry ten pounds;
9 frequently carry less than ten pounds; stand or walk for two hours
10 and sit for six hours in an eight-hour workday; occasionally climb,
11 balance, stoop, kneel, or crawl; never use ladders, ropes, or
12 scaffolds; avoid moderate exposure to industrial hazards;
13 occasionally have contact with co-workers and supervisors; never
14 have public contact; and limited to simple, repetitive tasks. (AR
15 17).

16
17 After reviewing Plaintiff's medical record (see AR 17-23), the
18 ALJ found that there was no objective evidence to support a CTS or
19 upper-extremity diagnosis, noting that (1) electrodiagnostic tests
20 for Plaintiff's upper extremities rendered normal results (AR 19-
21 20); (2) a pain management specialist found that Plaintiff had "5/5
22 strength" in her upper-extremities with a somewhat reduced grip in
23 the right hand (AR 20); and (3) a MRI of Plaintiff's wrists revealed

24 ² The ALJ found that Plaintiff's alleged collapsed arches and
25 degenerative changes in the feet, carpal tunnel syndrome ("CTS"),
26 gout, hypertension, and obsessive compulsive disorder were not
severe impairments. (AR 14).

27 ³ A Residual Functional Capacity is what a claimant can still
28 do despite existing exertional and nonexertional limitations. See
20 C.F.R. § 404.1545(a)(1).

1 tears of the left and right scapholunate ligaments and ganglion
2 cysts. (Id.). The ALJ determined that Plaintiff suffered from
3 limitations in her lower extremities because of a "mildly abnormal"
4 July 2014 electrodiagnostic test; an October 2014 MRI of the left
5 ankle showing a partial thickness tear; a July 2014 MRI of the
6 cervical spine revealing degenerative disc disease; and a December
7 2013 MRI of the lumbar spine showing a disc bulge in the L3-L4
8 facets, L4-L5 hypertrophy of the facets with moderate bilateral
9 neural foraminal narrowing, and a L5-S1 circumferential disc bulge.
10 (AR 18-21). Plaintiff also appeared with an antalgic, shuffling
11 gait and used either a cane or walker during appointments. (Id.).
12 The ALJ referenced physical therapy records stating that aquatic
13 therapy "decrease[d] [Plaintiff's] pain temporarily." (AR 20). The
14 ALJ found that Plaintiff suffered from mental limitations, noting
15 that she was diagnosed with general anxiety disorder and major
16 depressive disorder. (AR 19).

17
18 The ALJ then addressed Plaintiff's credibility and the opinions
19 of her treating, examining, and nonexamining physicians. (See AR
20 20-23). The ALJ found Plaintiff's statements regarding the
21 intensity, persistence, and limiting effects of her symptoms not
22 credible because Plaintiff was not compliant with treatment orders
23 to attend regular physical therapy appointments. (AR 21).

24
25 At step four, the ALJ determined that Plaintiff was not able
26 to perform her past relevant work as a policy holder information
27 clerk. (AR 23). At step five, the ALJ found Plaintiff was able to
28 perform jobs consistent with her age, education, and medical
limitations existing in significant numbers in the national economy.

1 At the hearing, the ALJ asked the VE whether a hypothetical person –
2 with the same age and educational background as Plaintiff, who could
3 occasionally lift at least 10 pounds; frequently lift and carry less
4 than 10 pounds; stand and walk for at least two hours in an eight-
5 hour workday; sit for at least six hours in an eight-hour workday;
6 and is limited to simple, repetitive tasks, no public contact, and
7 occasional contact with co-workers and supervisors – could perform
8 any work. (AR 51-52). The VE testified that such a person could
9 perform the requirements of assembler (Dictionary of Occupational
10 Titles ("DOT") No. 734.687-018⁴ (sedentary unskilled Specific
11 Vocational Preparation ("SVP") 27,000 positions in the national
12 economy)) and final assembler⁵ (DOT 713.687-018⁶ (sedentary unskilled
13 SVP 21,000 positions in the national economy)). (AR 52). The ALJ
14

15 ⁴ The DOT description for assembler requires "[e]xerting up to
16 10 pounds of force occasionally (Occasionally: activity or condition
17 exists up to 1/3 of the time) and/or a negligible amount of force
18 frequently (Frequently: activity or condition exists from 1/3 to 2/3
19 of the time) to lift, carry, push, pull, or otherwise move objects,
20 including the human body;" occasional "walking or standing for brief
periods of time;" and the "specific vocational preparation" to
reach, handle, and finger constantly. ASSEMBLER, DOT 734.687-018.

21 ⁵ The VE referred to this position as "small final assembler,"
22 but the DOT description lists it as "final assembler." (See AR 52;
23 DOT 713.687-018). For the sake of brevity, the Court refers to the
position as "final assembler."

24 ⁶ The DOT description for final assembler requires "[e]xerting
25 up to 10 pounds of force occasionally (Occasionally: activity or
26 condition exists up to 1/3 of the time) and/or a negligible amount
27 of force frequently (Frequently: activity or condition exists from
28 1/3 to 2/3 of the time) to lift, carry, push, pull, or otherwise
move objects, including the human body;" occasional "walking or
standing for brief periods of time;" and the "specific vocational
preparation" to reach, handle, and finger frequently. FINAL
ASSEMBLER, DOT 713.687-018.

1 did not ask the VE if her testimony conflicted with the DOT
2 description for assembler and final assembler. (See AR 51-52).

3
4 The ALJ adopted the VE's testimony in finding that, considering
5 the Plaintiff's age, education, work experience, and residual
6 functional capacity, Plaintiff was able to perform work as an
7 assembler and a final assembler. (AR 24). Accordingly, the ALJ
8 concluded that Plaintiff was not disabled. (AR 24-25).

9
10 On October 22, 2015, Plaintiff requested that the Appeals
11 Council review the ALJ's Decision, which was denied on March 1,
12 2016. (AR 1-8). The ALJ's Decision then became the final decision
13 of the Commissioner, allowing this Court to review the decision.
14 See 42 U.S.C. §§ 405(g), 1383(c).

15 16 **III. STANDARD OF REVIEW**

17
18 This court reviews the Administration's decision to determine
19 if the decision is free of legal error and supported by substantial
20 evidence. See Brewes v. Comm'r of Soc. Sec. Admin., 682 F.3d 1157,
21 1161 (9th Cir. 2012). "Substantial evidence" is more than a mere
22 scintilla, but less than a preponderance. Garrison v. Colvin, 759
23 F.3d 995, 1009 (9th Cir. 2014). To determine whether substantial
24 evidence supports a finding, "a court must consider the record as a
25 whole, weighing both evidence that supports and evidence that
26 detracts from the [Commissioner's] conclusion." Aukland v.
27 Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001). As a result, "[i]f
28 the evidence can reasonably support either affirming or reversing

1 the ALJ's conclusion, [a court] may not substitute [its] judgment
2 for that of the ALJ." Robbins v. Soc. Sec. Admin., 466 F.3d 880,
3 882 (9th Cir. 2006).

4 5 IV. PLAINTIFF'S CONTENTIONS

6
7 Plaintiff alleges that, at step five, the ALJ (1) did not
8 encompass Plaintiff's assigned functional limitations in posing the
9 hypothetical to the VE; and (2) failed to reconcile the VE's
10 testimony, that Plaintiff could perform the jobs of assembler (DOT
11 734.687-018) and final assembler (DOT 713.687-018), with the DOT.
12 (Joint Stip. at 3-14, 17-26).

13 14 V. DISCUSSION

15
16 After consideration of the record as a whole, the Court finds
17 that the Commissioner's findings are supported by substantial
18 evidence and are free from material legal error.⁷

19 20 A. The ALJ's Hypothetical Encompassed All Of Plaintiff's 21 Functional Limitations

22
23 Plaintiff contends that the ALJ's hypothetical was inadequate
24 because it omitted limitations resulting from Plaintiff's alleged
25 CTS and upper-extremity neuropathy. Plaintiff contends that

26 ⁷ The harmless error rule applies to the review of
27 administrative decisions regarding disability. See McLeod v.
28 Astrue, 640 F.3d 881, 886-88 (9th Cir. 2011); Burch v. Barnhart, 400
F.3d 676, 679 (9th Cir. 2005) (stating that an ALJ's decision will
not be reversed for errors that are harmless).

1 orthopedic tests and Plaintiff's subjective complaints establish
2 that Plaintiff has handling, fingering, and reaching limitations
3 that are supported by substantial evidence in the record. (Joint
4 Stip. at 8-14). Defendant asserts that the ALJ's hypothetical fully
5 encompassed Plaintiff's limitations that were supported by
6 substantial evidence in the record. (Joint Stip. at 14-17).

7
8 Hypothetical questions posed to the VE must include "all of the
9 claimant's functional limitations, both physical and mental"
10 supported by substantial evidence in the record. Thomas v.
11 Barnhart, 278 F.3d 947, 956 (9th Cir. 2002) (quoting Flores v.
12 Shalala, 49 F.3d 562, 570-71 (9th Cir. 1995); see Bayliss v.
13 Barnhart, 427 F.3d 1211, 1218 (9th Cir. 2005) (citing Magallanes v.
14 Bowen, 881 F.2d 747, 756-57 (9th Cir. 1989) (ALJ's reliance on VE
15 testimony was proper where hypothetical contained all Plaintiff's
16 limitations that were found credible and supported in record). An
17 ALJ may properly omit an alleged impairment from a hypothetical if
18 the omission of the impairment is supported by substantial evidence
19 in the record. Osenbrock v. Apfel, 240 F.3d 1157, 1165 (9th Cir.
20 2001).

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22 The ALJ found that Plaintiff was not functionally limited by
23 CTS and upper-extremity neuropathy because a July 2, 2014,

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1 electromyography test ("EMG")⁸ and a December 30, 2014,
 2 electrodiagnostic study of Plaintiff's upper extremities were
 3 negative for both conditions. (AR 600-02, 1148). Despite these
 4 clinical findings, Plaintiff maintains that positive Phalen's⁹ and
 5 median Tinel's¹⁰ tests in the record constitute substantial evidence
 6 that Plaintiff is functionally limited in handling, fingering, and
 7 reaching objects. (Joint Stip. at 9). However, these tests
 8 conflict with objective clinical findings that the ALJ found
 9 persuasive (see AR 19-20). Where the medical evidence in the record
 10 is not conclusive, "resolution of conflicts" is solely the function
 11 of the ALJ. Sample v. Schweiker, 694 F.2d 639, 642 (9th Cir. 1982).
 12 In such cases, "the ALJ's conclusion must be upheld." Morgan v.
 13 Comm'r, Soc. Sec. Admin., 169 F.3d 595, 601 (9th Cir. 1999).
 14 Accordingly, the ALJ's omission of limitations related to
 15 Plaintiff's alleged CTS and upper-extremity neuropathy diagnoses in
 16 the hypothetical is supported by substantial evidence in the record.

17 ⁸ "The diagnosis of [CTS] is made primarily by clinical
 18 examination and the patient's history of symptoms. It is important
 19 to remember that not all wrist and finger pain is [CTS]. In
 20 addition not all finger numbness or tingling is CTS. Confirmation
 21 of the diagnosis with the use of nerve electrodiagnostic testing is
 22 useful. Electrodiagnostic testing, made up of nerve conduction and
 [EMG] testing is used to confirm the diagnosis of [CTS] and other
 nerve disorders." [https://www.hss.edu/conditions_carpal-tunnel-](https://www.hss.edu/conditions_carpal-tunnel-syndrome-myths-facts-diagnosis-treatment.asp)
[syndrome-myths-facts-diagnosis-treatment.asp](https://www.hss.edu/conditions_carpal-tunnel-syndrome-myths-facts-diagnosis-treatment.asp).

23 ⁹ A Phalen's test is an orthopedic test used to diagnose CTS.
 24 Positive signs of a Phalen's test include upon compression,
 25 complaints of pain, tingling, or numbness in the hands.
http://www.physio-pedia.com/Phalen's_Test.

26 ¹⁰ A Tinel's test is an orthopedic test used to detect
 27 irritated nerves. Positive signs of a Tinel's test is upon light
 28 tapping over a nerve the patient complains of a tingling sensation.
http://www.physio-pedia.com/Tinel%E2%80%99s_Test.

1 Moreover, Plaintiff contends that the ALJ was required to
2 include her subjective complaints regarding pain, tingling, and
3 numbness in her hands in the hypothetical question to the VE or in
4 formulating her RFC. (Joint Stip. at 13). However, the ALJ
5 provided clear and convincing reasons to find Plaintiff's testimony
6 regarding her symptoms and limitations not credible. (AR 20-23).
7 Brown-Hunter v. Colvin, 806 F.3d 487, 493 (9th Cir. 2015) (An ALJ
8 may "reject the claimant's testimony about the severity of her
9 symptoms only by offering specific, clear and convincing reasons for
10 doing so.").

11
12 The ALJ found that Plaintiff's statements concerning the
13 intensity, persistence, and limiting effects of her symptoms were
14 not entirely credible because they were not corroborated by the
15 record and because Plaintiff had failed to follow a prescribed
16 course of treatment despite "improvement in symptomology." (AR 22-
17 23). This was a clear and convincing reason to find Plaintiff's
18 testimony less credible.¹¹ See Osenbrock, 240 F.3d at 1157-1166
19 (affirming ALJ's decision that relied in part on finding that
20 neurological and orthopedic evaluations revealed "very little
21 evidence" of any significant disabling abnormality of the claimant's
22

23 ¹¹ Although a claimant's credibility "cannot be rejected on the
24 sole ground that it is not fully corroborated by objective medical
25 evidence, the medical evidence is still a relevant factor . . ."
26 Rollins v. Massanari, 261 F.3d 853, 857 (9th Cir. 2001). Lack of
27 supporting objective medical evidence is a key consideration for the
28 ALJ in evaluating credibility. See 20 C.F.R. §§ 404.1529(c)(4);
416.929(c)(4) (in determining disability, an ALJ must evaluate a
claimant's statements about the intensity, persistence and limiting
effects of her symptoms "in relation to the objective medical
evidence and other evidence").

1 upper or lower extremities, or spine); Chaudhry v. Astrue, 688 F.3d
2 661, 672 (9th Cir. 2012) (quoting Orn v. Astrue, 495 F.3d 625, 638
3 (9th Cir. 2007) ("[I]f a claimant complains about disabling pain but
4 fails to seek treatment, or fails to follow prescribed treatment,
5 for the pain, an ALJ may use such failure as a basis for finding the
6 complaint unjustified or exaggerated . . . ").

7
8 The record supports the ALJ's finding that Plaintiff did not
9 follow prescribed physical therapy treatment to alleviate her
10 symptoms. Plaintiff was prescribed aquatic physical therapy in
11 order to improve her range of motion and strength, which included
12 shoulder flexion and extension, wall push-ups, straight arm circles,
13 and various lower-extremity exercises. (AR 842-50). On March 26,
14 2015, Plaintiff's physical therapist, Shannon Walker, P.T., informed
15 treating physician, Abel Quesada, M.D., "that [Plaintiff] ha[d] not
16 been fully participating in MD prescribed PT visits," missing eleven
17 appointments in the course of three months and attending only three
18 appointments over the course of four weeks. (AR 850). On April 20,
19 2015, Chelsea Sobeich, D.P.T., noted that Plaintiff "demonstrate[d]
20 improved [range of motion] and strength since beginning aquatic
21 therapy [and] would benefit from aquatic therapy if she was more
22 consistent with attendance." (AR 849). Similarly, on June 18,
23 2013, a therapist at the Physical Therapy Center noted that
24 Plaintiff "showed up only once for evaluation" and did not attend
25 any further physical therapy visits. (AR 270). Throughout these
26 periods, Plaintiff kept regular appointments with Suhasini Dushmukh,
27 M.D. (see 394-591), Charles Schwartz, M.D. (see AR 670-84), Nina
28 Barlevy Psy.D. (see 685), and Amir Pouradib, M.D. (see 856-71).

1 Plaintiff's unexplained failure to follow prescribed physical
2 therapy treatment is therefore a clear and convincing reason to
3 reject Plaintiff's symptom testimony. See Chaudhry, 688 F.3d at
4 672.

5
6 **B. The VE's Testimony Does Not Conflict With The DOT**

7
8 Plaintiff contends that the ALJ improperly found that Plaintiff
9 is able to perform the occupations of assembler (DOT 734.687-018)
10 and final assembler (DOT 713.687-018) because there is a deviation
11 between Plaintiff's RFC and the description of these positions in
12 the DOT. (Joint Stip. at 5-8). Specifically, Plaintiff alleges
13 that the ALJ's finding that Plaintiff's RFC limits her to
14 "frequently" lifting and carrying less than 10 pounds (AR 17),
15 conflicts with the DOT descriptions for these jobs, which require a
16 worker to "have constant reaching, handling, and fingering"
17 abilities, and be able to perform "repetitive work, or perform[]
18 continuously the same work, according to set procedures, sequence,
19 or pace." (Joint Stip. at 5-6). Defendant asserts that "[t]he
20 hypothetical question included all of the limitations found by the
21 ALJ, who, contrary to Plaintiff's assertions, did not limit
22 [Plaintiff] to frequent use of the hands." (Joint Stip. at 14).

23
24 The ALJ relies on the DOT and VE testimony to determine whether
25 – given the claimant's RFC, age, education, and work experience –
26 the claimant "actually can find some work in the national economy."
27 20 C.F.R. § 416.966(e); Zavalin v. Colvin, 778 F.3d 842, 846 (9th
28 Cir. 2015); Valentine v. Comm'r Soc. Sec. Admin., 574 F.3d 685, 689

(9th Cir. 2009). "When there is an apparent conflict between the [VE's] testimony and the DOT – for example, expert testimony that a claimant can perform an occupation involving DOT requirements that appear to be more than the claimant can handle – the ALJ is required to reconcile the inconsistency." Zavalin, 778 F.3d at 846 (citing Massachi v. Astrue, 486 F.3d 1149, 1153-54 (9th Cir. 2007)). An ALJ's failure to inquire into an apparent conflict is harmless where there is no actual conflict between the RFC and the DOT. Ranstrom v. Colvin, 622 F. App'x 687, 689 (9th Cir. 2015) (citing Massachi, 486 F.3d at 1154 n. 19).

Here, the VE testified that Plaintiff can perform the occupations of assembler (DOT 734.687-018) and final assembler (DOT 713.687-018). (AR 51-52). The DOT defines assembler as a sedentary position that requires "[e]xerting up to 10 pounds of force occasionally;" a "negligible amount of force frequently . . . to lift, carry, push, pull, or otherwise move objects;" and constant handling, fingering, and reaching. 734.687-018 ASSEMBLER, DOT 734.687-018. The DOT description for final assembler is the same as that of assembler, except that it requires frequent (exists 1/3 to 2/3 of the time) handling, fingering, and reaching. See 713.687-018 FINAL ASSEMBLER, DOT 713.687-018.

The ALJ's RFC determination was consistent with the DOT descriptions for the jobs identified by the VE. Despite Plaintiff's assertions (see Joint Stip. at 5), the ALJ assigned no limitation regarding Plaintiff's ability to, handle, finger, or reach objects. (AR 17). Thus, the VE's testimony that Plaintiff could perform the

1 jobs of assembler and final assembler did not deviate from the DOT.
2 See Reese v. Astrue, No. ED CV 11-540-PLA, 2012 WL 137567, at *7
3 (C.D. Cal. Jan. 17, 2012) (finding no conflict between the DOT and
4 Plaintiff's limitations where ALJ's RFC determination contained no
5 reaching limitations and VE testimony stated Plaintiff could perform
6 jobs that require constant reaching).

7
8 Moreover, the ALJ's failure to question the VE regarding an
9 apparent conflict between the DOT and VE testimony is harmless
10 error. See Massachi, 486 F.3d at 1154 n. 19 (it is harmless error
11 for an ALJ to not inquire about an apparent conflict between the DOT
12 and RFC when there is no actual conflict between these
13 descriptions). Accordingly, the ALJ properly found that Plaintiff
14 could perform the alternative work of assembler and final assembler.

15
16 **VI. CONCLUSION**

17
18 For the foregoing reasons, the decision of the Administrative
19 Law Judge is AFFIRMED.

20
21 LET JUDGMENT BE ENTERED ACCORDINGLY.

22
23 Dated: February 8, 2017

24
25
26 _____/s/_____
27 ALKA SAGAR
28 UNITED STATES MAGISTRATE JUDGE